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Supreme Court of the United States

October Term, 1961.

No. 871

THE H. B. IVES COMPANY,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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SUPREME COURT OF THE UNITED STATES.

October Term, 1961.

No.

THE H. B. IVES COMPANY,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

The H. B. Ives Company, by its counsel, prays that a writ of certiorari issue to review the judgment entered in this case by the United States Court of Appeals for the Second Circuit.

FINDINGS OF FACTS AND OPINIONS BELOW.

The memorandum Findings of Facts and Opinion of Judge Opper of The Tax Court of the United States who decided the case is reported in 30 T. C. 295, and printed in (Appendix A, infra, pages 10-16). The opinion of the Court of Appeals entered December 28, 1961, reversing and remanding the case to The Tax Court is not reported, but is printed in (Appendix B, infra, pages 17-20).

JURISDICTION.

The judgment of the Court of Appeals (Appendix C, infra, pages 20-21) was entered on December 28, 1961. A petition for rehearing was filed on January 11, 1962 and was denied by the order of the Court of Appeals on January 16, 1962 (Appendix F, infra, page 25). The time for filing this petition for writ of certiorari expires April 16, 1962. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254.

QUESTION PRESENTED

Whether the petitioner taxpayer properly accrued and deducted in 1953, under Section 23(a)(1)(A) of the Internal Revenue Code of 1939, an amount paid by it on February 16, 1954, which represented a sum authorized and appropriated by the petitioner taxpayer's directors by a resolution on November 24, 1953, for the purchase of annuities for four employees ineligible under its 1951 Annuity Plan.

STATUTES INVOLVED.

Sec. 23(a)(1)(A), Internal Revenue Code of 1939:

> Sec. 23. In computing net income there shall be allowed as deductions:
>
> (a) Expenses.—
>
> (1) Trade or Business Expenses.—
>
> (A) In General.—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, * * *.

Sec. 23(p)(1)(D), Internal Revenue Code of 1939:

> (p) Contributions of an employer to an Employee's Trust or Annuity Plan and Compensation under a Deferred Payment plan.—
>
> (1) General Rule.—"If contributions are paid by an employer to or under a stock bonus, pension, profit-

sharing or annuity plan, or if compensation is paid or accrued on account of any employee under a plan deferring the receipt of such compensation, such contributions or compensation shall not be deductible under Subsection (a) but shall be deductible, if deductible under Subsection (a) without regard to this subsection, under this subsection but only to the following extent:

(D) In the taxable year when paid, if the plan is not one included in paragraphs A, B, or C, if the employees' rights to or derived from such employer's contribution or such compensation are nonforfeitable at the time the contribution or compensation is paid.

If there is no plan but a method of employer contributions or compensation has the effect of a stock bonus, pension, profit-sharing, or annuity plan, or similar plan deferring the receipt of compensation, this paragraph shall apply as if there were such a plan.

STATEMENT OF THE CASE.

Petitioner taxpayer created a group life annuity plan for the purpose of providing retirement benefits for its employees. The plan covered petitioner taxpayer's employees who were under the age of seventy years and otherwise qualified. However, four of the employees were ineligible under the plan because they were over the age of seventy years. In 1953, petitioner taxpayer's directors adopted a resolution to provide these four employees with annuities comparable to those provided for employees covered by the plan. On January 15, 1954, the policies were issued by the insurance company. The Tax Court sustained petitioner taxpayer, on an accrual basis of accounting, which had deducted the amount paid for the four annuity contracts on

its 1953 return as a business expense. Petitioner taxpayer's purchase of annuity contracts for each of the ineligible employees did not represent compensation for past services and was not a method which had the effect of an annuity plan or similar plan deferring the receipt of compensation. Therefore, the authorized payment for the policies was an ordinary and necessary business expense and a properly accrued liability for the year 1953.

REASONS FOR GRANTING THE WRIT.

DIRECT CONFLICT BETWEEN DECISIONS OF COURTS OF APPEALS.

There is a direct conflict between the decision of the Court below and the decision in *Champion Spark Plug v. Commissioner of Internal Revenue*, 266 F. 2d 347 (6th Cir. 1959). The facts in both cases are so identical that they demand the following comparative outline:

Champion Spark Plug Co.	*H. B. Ives Company*
Resolution of board of directors adopted Dec. 16, 1953, appropriating $33,750.00 to make monthly payments equivalent to monthly salary payments to begin Jan. 15, 1954. No contract signed.	Resolution of board of directors adopted Nov. 24, 1953, appropriating $22,000.00 to purchase four annuity contracts. Payments under the annuity contracts began as follows:
	Furman Romans 2-15-54
	Louis Fusco 2-15-54
	George W. Bradley 3-15-55
	Frank Apuzo 6-15-55

	The contracts were not signed until Jan. 15, 1954.
When resolution adopted Dec. 16, 1953, employee had cancer—would be unable to work.	When resolution adopted Nov. 24, 1953, above employees' ages, respectively were 81, 74, 79, 73.
Resolution adopted because employee was not eligible for company financial pension plan because of nature of duties.	Resolution adopted because four above employees not eligible for group annuity contract of respondent in 1951, because they were over the age of 70.
The payments under the resolution were not contingent upon a continued employee-employer relationship.	The establishment of the annuity contracts under the resolution was not contingent upon a continued employee-employer relationship. An examination of the resolution and the annuity contract offered in evidence will so indicate.
The benefits given under the resolution were equivalent to the benefits the employee would have received had he qualified under the company pension plan.	The benefits given under the resolution were "equivalent benefits" the four employees would have received had they been eligible under the group contract of 1951 of the respondent.

The resolution of the *Champion Spark Plug Co.* case reads as follows:

"RESOLVED: That in recognition of the long and faithful services rendered to the Company by Ernest C. Badger, who has been completely disabled from an incurable illness and will not be able to render any further service, there be paid to him a sum equal to thirty times his present monthly salary, such sum, namely: $33,750.00, to be paid in sixty equal semi-monthly installments, commencing January 15, 1954 as a continuation of his present salary, provided that in the event of his death before payment to him of said amount in full, the balance shall be paid in comparable installments to his wife, Doris E. Badger, if living, otherwise to her estate."

The minutes of the meeting of the Board of Directors of the petitioner, of November 24, 1953, state:

"Our President advised the board that four long service employees were excluded from our insured plan merely because they happened to be over 70 years at its inception. Two of these will retire early in 1954, another during the first half of year 1955, while a fourth has already retired. He stated that he felt we were really obligated to give these employees equivalent benefits, that he had contacted an insurance agent who had recommended the immediate purchase of annuities to take care of the company's obligation.

"Resolution was passed as follows:

"Resolved that the sum of $22,000.00 be appropriated and set aside immediately for the purchase of annuity contracts for the four employees, that the President be authorized to negotiate with various insurance companies and enter into the necessary annuity contracts to accomplish the purpose of the resolution, and that the moneys hereby appropriated and set up as a liability of the corporation as of this date

and that negotiation with the insurance company be completed prior to February 15, 1954 when the first additional employee will retire.'"

The Tax Court held for the petitioner taxpayer on the basis of the *Champion Spark Plug Co.* case. The Court below erred in reversing the Tax Court and thereby created a direct conflict between its decision in the instant case and the decision of the Court in the *Champion Spark Plug Co.* case in the Sixth Circuit.

This case involves the interpretation of a very important question of tax law dealing with expenditures of corporations having a connection with employer and employee relationship which the employer, for business reasons or good employee relationship, desires to pay or obligate itself to pay.

Of additional importance is whether under modern concepts of employer and employee relationship, it is sufficient that an employer desire to obligate itself to make payments that have a connection with its employer and employee relationship and to translate such desire into an unconditional obligation to make the payments as ordinary and necessary in the conduct of its business and be properly accruable in the year in which the obligation to pay was made fixed and definite by its action.

CONCLUSION

The petition for writ of certiorari should be granted for the reasons above stated.

Respectfully submitted,

JULES G. KORNER, III,
Counsel for Petitioner

ROMEIKA, FISH & SCHECKTER
ALPHONSUS R. ROMEIKA,
215 South Broad Street,
Philadelphia 7, Pa.

April, 1962.

APPENDIX A.

Docket No. 62888.

THE H. B. IVES COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

For Respondent.

DOCKET ENTRIES.

1956

Jun. 8—Petition received and filed. Taxpayer notified. Fee paid.

Jun. 14—Copy of petition served on General Counsel.

Jul. 27—Answer filed by Resp. Served 7-31-56.

Jul. 27—Request for Circuit hearing in Boston, Mass. filed by Resp. 7-30-56, granted.

1958

Oct 13—Notice of trial Jan. 5, 1959.

1959

Jan. 12—Trial at Boston by Judge Opper. Stip. of facts with exs. filed. Appearance of Alphonsus R. Romeika, Esq., filed. Served 1-19-59. Orig. Briefs due April 13, 1959; replies due May 13, 1959.

Jan. 28—Transcript of Proceedings of Jan. 12, 1959 filed.

Feb. 5—Appearance of Carleton R. Hedner, Esq., filed at trial Jan. 5, 1959.

Mar. 20—Motion by resp. to withdraw petr's Exs. 2 and 3 for photostatic copies. Gr. 3-25-59. Served 3-26-59.

Apr. 6—Motion by petr. for extention of time to May 1, 1959 to file brief. Gr. 4-7-59. Served 4-8-59.

Apr. 28—Motion by petr. for extension of time to June 1, 1959 to file brief. Gr. 4-29-59.

May 1—Brief filed by resp.

Jun. 1—Brief filed by petr. Served 6-1-59.

Sep. 30—Memo. Findings of Fact and Opinion filed. Decision under Rule 50 J. Opper. Served 10-2-59.

Nov. 19—Agreed Computation filed.

Nov. 27—Decision entered. Judge Opper. Served 12-1-59.

1960

Feb. 23—Petition for review by U. S. Ct. of Ap. 2nd Cir. filed by resp.

Feb. 23—Notice of filing sent counsel filed.

Feb. 29—Proof of service of pet. for rev. on counsel filed.

Mar. 7—Proof of service of pet. for rev. on taxpayer filed.

Mar. 17—Order extending time for filing record on rev. and docketing pet. for rev. to May 23, 1960.

(Caption Omitted.)

(Tr. 119.) MEMORANDUM FINDINGS OF FACT AND OPINION.

OPPER, Judge: Respondent determined a deficiency in petitioner's income tax of $16,525.89 for the year 1953. The only issue is whether petitioner properly accrued and deducted in 1953 under section 23 (a) (1) (A), I.R.C. 1939, an amount paid in 1954 which represented a sum authorized by its directors in 1953 for the purchase of annuities for employees ineligible under its 1951 annuity plan, or whether such amount was deductible, if at all, solely under section 23 (p), I.R.C. 1939.

(Tr. 120) FINDINGS OF FACT.

The stipulated facts are found.

Petitioner is a Connecticut corporation with its principal office in New Haven, Connecticut. It filed its return for the year 1953 with the director of internal revenue at Hartford, Connecticut. Petitioner keeps its books of account and prepares its returns on an accrual method of accounting and on a calendar year basis.

In 1951 petitioner created a group life annuity plan, hereafter called the 1951 plan, for the purpose of providing retirement benefits for its employees. The 1951 plan covered petitioner's employees who were under the age of 70 years and otherwise qualified. From 1951 through 1953, the cost of this plan was $21,244.87, $22,105.42, and $20,898.72, respectively. Petitioner deducted these respective amounts on its 1951, 1952 and 1953 returns.

Four of petitioner's employees were ineligible under the 1951 plan because they were over the age of 70 years. These employees, hereafter called the ineligible employees, and their respective dates of birth, were:

Name of Employee	*Date of Birth*
Frank Apuzzo	August 14, 1871
George W. Bradley	February 25, 1874
Louis Fusco	January 11, 1879
Furman Romans	May 15, 1880

(Tr. 121) Petitioner felt it had a moral obligation to give the same pension benefits to the ineligible employees who were excluded from the 1951 plan.

On November 24, 1953, petitioner's directors held a meeting. The minutes of this meeting stated:

Our President advised the board that four long service employees were excluded from our insured (1951) plan merely because they happened to be over 70 at its inception. Two of these will refire early in 1954, another during the first half of year 1955, while a fourth has already retired. He stated that he felt we were really obligated to give these (ineligible) employees equivalent benefits, and he had contacted an insurance agent who had recommended the immediate purchase of annuities to take care of the company's obligation.

(Resolution was passed as follows:)

Resolved that the sum of $22,000.00 be appropriated and set aside immediately for the purchase of annuity contracts for the four (ineligible) employees that the President be authorized to negotiate with various insurance companies and enter into the necessary annuity contracts to accomplish the purpose of the resolution, and that the moneys hereby appropriated and set up as a liability of the corporation as of this date and that negotiation with the insurance company be completed prior to February 15, 1954 when the first additional (ineligible) employee will retire.

After the adoption of the November 24, 1953 resolution, petitioner's president negotiated with an insurance company for the purchase of annuity contracts for each of the ineligible employees. Difficulty encountered in obtaining the correct ages of the ineligible employees caused a delay in the execution of the annuity contracts.

(Tr. 122) The applications for each of the annuity contracts were similar except for the amounts and dates the payments would begin.

On January 15, 1954, the effective date of the annuity contracts, the insurance company sent petitioner an invoice for the four annuity contracts in the total amount of $22,-

100.42. On February 16, 1954, petitioner paid the invoice of $22,100.42.

Petitioner made the following entry on its books as of December 31, 1953:

Dr. Pensions Paid	$22,463.89	
Cr. Accounts Payable		$22,463.89

It also deducted this amount of $22,463.89 in its 1953 return. Respondent determined that the accrued amount of $22,463.89 was deductible in the year when paid pursuant to section 23 (p) (1) (D), I.R.C. 1939. Petitioner conceded in brief that $363.47, the difference between $22,463.89 and $22,100.42, was an erroneous entry.

Furman Romans retired in September 1952. At that time petitioner began to pay him a monthly amount equivalent to what he would have received under the 1951 plan.

Louis Fusco, George W. Bradley and Frank Apuzzo retired on February 15, 1954, March 15, 1954 and June 15, 1955, respectively.

(Tr. 123) Petitioner's purchase of annuity contracts for each of the ineligible employees did not represent compensation for past services and was not a method which had the effect of an annuity plan or similar plan deferring the receipt of compensation.

The authorized payment of $22,100.42 was an ordinary and necessary business expense and a properly accrued liability for the year 1953.

OPINION.

We cannot distinguish this case from Champion Spark Plug Co., 30 T. C. 295, which has now, and subsequent to the filing of these briefs been affirmed on review (C.A. 6) 266 F. 2d 347. The accrual of the liability here was as

properly deductible at the time the obligation was incurred as it was in the Champion case.

And section 23 (p) is no more applicable here than it was there. In the words of that case:

> Petitioner's discharge of the obligation in the manner revealed by this record was not the payment of compensation under any plan deferring the receipt of compensation such as to render section 23 (p), or the * * * regulations, applicable.

Here, as there, "(p)etitioner, with commendable solicitude * * * felt some measure of obligation due to the fact that" the employees in question were not (Tr. 124) includible by reason of their age at the time petitioner adopted its retirement plan, and by reason of their actual or impending retirement. That in the Champion case the employee's uninsurability arose on account of the type of his occupation, and that he later contracted an incurable disease, seems to us a hairbreadth distinction that cannot survive examination.

Decision will be entered under Rule 50

(Caption Omitted)

(Tr. 131) DECISION

Respondent having on November 19, 1959 filed a recomputation of tax for entry of decision, in accordance with Memorandum Findings of Fact and Opinion herein, filed September 30, 1959, and petitioner having concurred therein, now, therefore, it is

ORDERED AND DECIDED: That the notice of deficiency was mailed on March 13, 1956, and that there is an overpayment of income tax for the calendar year 1953 in the amount of $1,576.64, which amount was paid on September 10, 1954, and within the time provided by section 322 (d)(1)(A), I.R.C. 1939, as amended, and section 6512(b), I.R.C. 1954.

(Signed) CLARENCE V. OPPER,
Judge.

Enter: Entered Nov. 27, 1959.

Decision is correct and in accord with opinion or Rule 50 computation.

MANNING K. LEITER,
(Attorney)
Dec. 10, 1959
(Date)

APPENDIX B.

UNITED STATES COURT OF APPEALS.

For the Second Circuit.

No. 4—September Term, 1961.

(Argued November 2, 1961. Decided December 28, 1961.)

Docket No. 26275.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

THE H. B. IVES COMPANY,
Respondent.

Before: CLARK, HINCKS and FRIENDLY, Circuit Judges.

On petition to review a decision of the Tax Court of the United States, Clarence V. Opper, Judge.

Reversed and remanded.

FRED E. YOUNGMAN, Atty., Dept. of Justice, Washington, D. C. (CHARLES K. RICE, Asst. Atty. General, MEYER ROTHWACKS and I. HENRY KUTZ, Attys., Dept. of Justice, Washington, D. C., on the brief), for petitioner.

ALPHONSUS R. ROMEIKA, of ROMEIKA, FISH & SCHECKTER, Philadelphia, Pa. (R. C. McCREEDY, New York City, on the brief), for respondent.

HINCKS, Circuit Judge:

The Commissioner petitions for review of a Tax Court holding that an authorization of expenditure by the respondent's board of directors was an accrued liability in the year of authorization.

Taxpayer reports its income on an accrual basis. On November 24, 1953, desiring to benefit four elderly employees who had not qualified for the company pension plan, the board of directors resolved that "$22,000 be appropriated and set aside immediately for the purchase of annuity contracts for the four employees, that the President be authorized to negotiate with various insurance companies and enter into the necessary annuity contracts * * * and that the moneys hereby appropriated and set up as a liability of the corporation as of this date and that negotiations with the insurance company be completed prior to February 15, 1954 * * *."

The taxpayer's president then commenced negotiation with an insurance company, but due to difficulties in obtaining the correct ages of the employees, the contracts were not executed until January 15, 1954. On December 13, 1953, the taxpayer had made an entry on its books debiting "Pensions Paid," and crediting "Accounts Payable," $22,463.89. In February 1954, it paid the insurance

company $22,100.42. The question is whether it was right in deducting the price of the contracts from its income for 1953.

Section 23(a)(1)(A), 1939 Code, allows a deduction for all ordinary and necessary expenses "paid or incurred" during the taxable year. Section 43 adds the prescription that such deductions "shall be taken for the taxable year in which 'paid or accrued' or 'paid or incurred,' dependent upon the method of accounting upon the basis of which the net income is computed, unless in order to clearly reflect the income the deductions or credits should be taken as of a different period."

Both receipts and liabilities are to be reported by accrual-basis taxpayers not when cash changes hands, but when "all the events * * * occur which fix the amount of the (liability) and determine the liability * * * to pay it," United States v. Anderson, 269 U. S. 422, 441 (1926). And although the taxpayer's accounting may be acceptable by general business standards, the "economic and bookkeeping sense" of §§41, 42, and 43 of the 1939 Code is decided not by passive acceptance of the taxpayer's methods, but by the principles of the tax law. See American Automobile Ass'n v. United States, 367 U. S. 687 (1961).

Thus neither the resolution of respondent's board of directors, nor the entry on its books, in themselves establish the proper accrual of the claimed liability in 1953. Deduction could be claimed only when the liability to pay became certain. United States v. Anderson, supra; United States v. Olympic Radio & Television, 349 U. S. 232 (1955); see United States v. Consolidated Edison Co., 366 U. S. 380 (1961). Yet Ives was under no obligation to pay the insurance company until the contracts were executed in 1954. And while its board may commendably have felt a moral obligation to the four employees, no underlying legal obligation similar to that found in Champion Spark Plug, 30

T. C. 295, aff'd per curiam, 266 F. 2d 347 (6th Cir. 1959), can be said to exist here. Since the obligation to pay was not certain until 1954, the expenditure was not "paid or incurred" in 1953, within the meaning of 23, 1939 Code.

Reversed and remanded.

APPENDIX C.

UNITED STATES COURT OF APPEALS.

SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-eighth day of December one thousand nine hundred and sixty-one.

PRESENT:

HON. CHARLES E. CLARK,
HON. CARROLL C. HINCKS,
HON. HENRY J. FRIENDLY,
Circuit Judges.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner

v.

THE H. B. IVES COMPANY,
Respondent.

Appeals from The Tax Court of the United States.

This cause came on to be heard on the transcript of record from The Tax Court of the United States, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the order of said The Tax Court of the United States be and it hereby is reversed and that the action be and it hereby is remanded in accordance with the opinion of this Court.

A. DANIEL FUSARO,
Clerk.

APPENDIX D.

UNITED STATES COURT OF APPEALS.
FOR THE SECOND CIRCUIT.

No. 26275.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

THE H. B. IVES COMPANY,
Respondent.

PETITION FOR REHEARING.

To the Honorable Judges of the Said Court:

Respondent, The H. B. Ives Company, presents this, its Petition for a Rehearing of the above-entitled cause, and in support thereof, respectfully shows that:

The Honorable Court erred in stating in its opinion at page 419 that:

> "No underlying legal obligation similar to that found in Champion Spark Plug Co., 30 T. C. 295, aff'd per curiam, 266 F. 2nd 347 (6th Cir. 1959), can be said to exist here."

In the *Champion Spark Plug Case*, 30 T. C. 295, the Tax Court stated that no underlying legal obligation is required. Said the Court at page 298 of its opinion:

> "It is true that accrual of an expense as a deduction is dependent upon the existence of a fixed and definite obligation. And it may be true that here there was no underlying legal liability compelling the petitioner to make the fixed and definite obligation. But this lack of an underlying legal liability is not fatal to petitioner's argument. There is no requirement that 'there must be an underlying legal obligation to make an expenditure before it can qualify as an "ordinary and necessary" business expense under section 23 (a) (1), Internal Revenue Code of 1939'. Waring Products Corporation, 27 T. C. 921, 929. It is just as true that there is no requirement that there must be an underlying legal liability before a definite and fixed obligation to make an expenditure can qualify as an accrued 'ordinary and necessary' business expense under section 23 (a) (1), I. R. C. 1939. In either instance, the basic question is, as we stated in Waring Products Corporation, supra, 'whether, in all the circumstances, the expenditure is ordinary and appropriate to the conduct of the taxpayer's business.'"

The Court of Appeals for the Ninth Circuit, affirmed the Tax Court in the *Champion Spark Plug Case*, in a per curiam opinion.

The Court erred in not sustaining the Tax Court's position that the facts in the instant case and the *Champion Spark Plug Case* are indistinguishable and, therefore, the *Champion Spark Plug Case* should be controlling.

For the reasons stated above, Petitioner, H. B. Ives Company, requests that a rehearing be granted and that on such rehearing the judgment of this Court be reversed and the judgment of the Tax Court be affirmed.

Dated: January 10, 1962.

Respectfully submitted,

s ALPHONSUS R. ROMEIKA,
ROMEIKA, FISH & SCHECKTER,
Attorneys for Respondent.

H. B. Ives Company, Respondent, herein, by its attorney hereby certifies that the foregoing Petition for rehearing is not presented for the purpose of delay or vexation, but is, in the opinion of counsel, well founded in law and proper to be filed herein.

Dated: January 10, 1962.

s ALPHONSUS R. ROMEIKA,
ROMEIKA, FISH & SCHECKTER,
Attorneys for Respondent.

APPENDIX E.

UNITED STATES COURT OF APPEALS.
FOR THE SECOND CIRCUIT.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

THE H. B. IVES COMPANY,
Respondent.

Before: CLARKE, HINCKS and FRIENDLY,
Circuit Judges.

On Petition for Rehearing.

ALPHONSUS R. ROMEIKA, of ROMEIKA, FISH & SCHECKTER, Philadelphia, Pa. (R. C. McCREEDY, New York City, of counsel), for respondent.

PER CURIAM.

Petition for rehearing denied.

C. E. C.
C. C. H.
H. J. F.

January 16, 1962.

APPENDIX F.

UNITED STATES COURT OF APPEALS.

SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the sixteenth day of January, one thousand nine hundred and sixty-two.

PRESENT:
HON. CHARLES E. CLARK,
HON. CARROLL C. HINCKS,
HON. HENRY J. FRIENDLY,
Circuit Judges.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

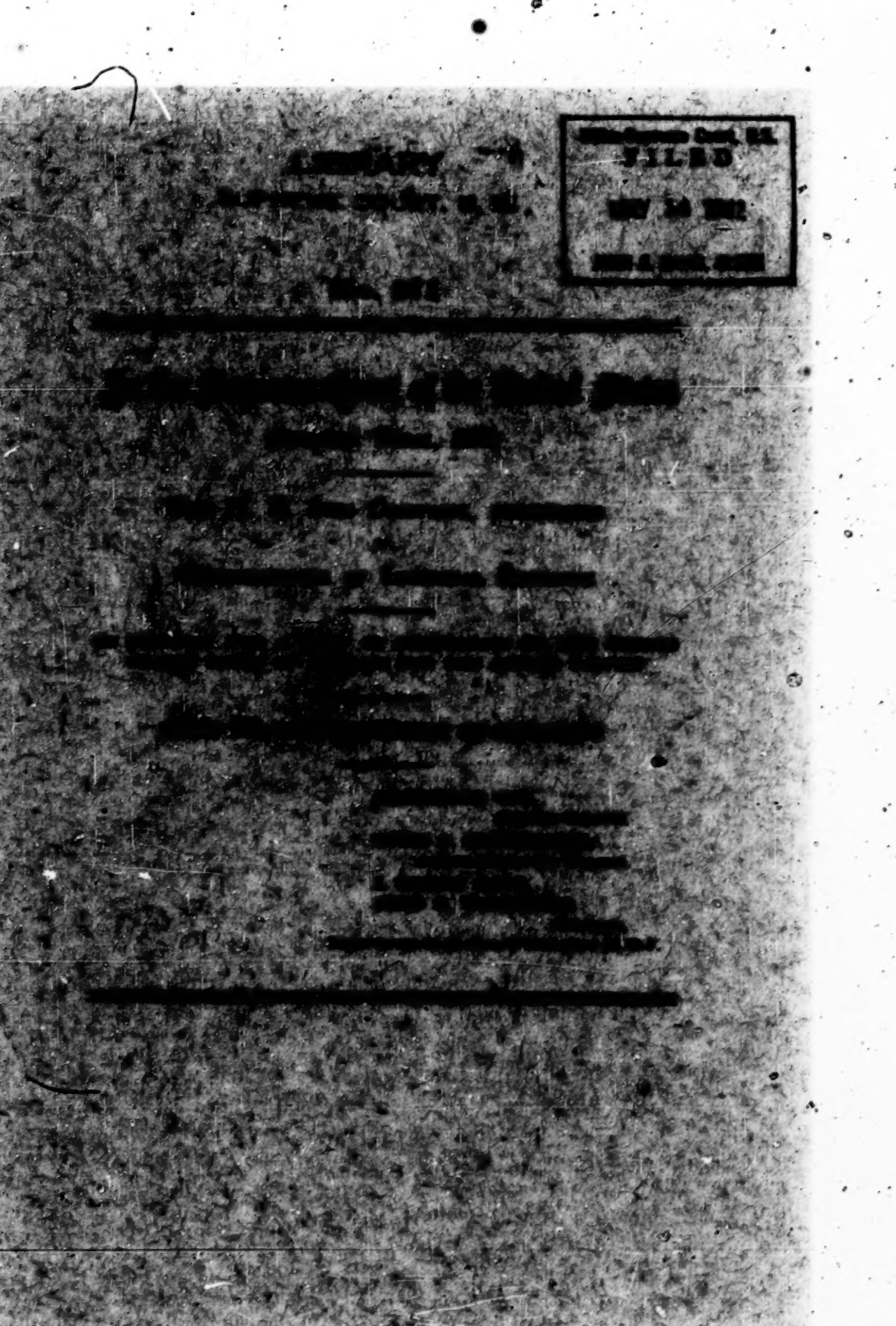
THE H. B. IVES COMPANY,
Respondent.

A petition for a rehearing having been filed herein by counsel for the respondent

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO,
Clerk.



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CITATIONS

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629479—62

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 871

THE H. B. IVES COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum findings of fact and opinion of the Tax Court (Pet. 11–15) are not reported.[1] The opinion of the court of appeals (Pet. 17–20) is reported at 297 F. 2d 229.

JURISDICTION

The judgment of the court of appeals (Pet. 20–21) was entered December 28, 1961. A petition for rehearing (Pet. 21–23) was denied on January 16, 1962 (Pet. 24). The petition for a writ of certiorari

[1] The petition cites 30 T.C. 295 as the report of the Tax Court opinion; actually this is the citation to the Tax Court opinion in *Champion Spark Plug Co.* v. *Commissioner* (discussed *infra*, p. 7).

was filed April 13, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, as the court below held, taxpayer's obligation for the purchase of annuity contracts for four employees did not accrue until 1954, when taxpayer executed the contracts with the insurance company—there being no underlying legal obligation to the employees—or, whether, on the contrary, as the Tax Court held, this obligation accrued in 1953, when taxpayer's directors adopted a resolution that a sum be set aside immediately for purchase of the annuities and that its president negotiate with various insurance companies to enter into the annuity contracts.

STATUTE INVOLVED

Internal Revenue Code of 1939 (26 U.S.C. 1952 ed.):

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) [As amended by Sec. 121(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Expenses.*—

(1) *Trade or business expenses.*—

(A) *In General.*—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; * * *

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SEC. 43. PERIOD FOR WHICH DEDUCTIONS AND CREDITS TAKEN.

The deductions and credits (other than the corporation dividends paid credit provided in section 27) provided for in this chapter shall be taken for the taxable year in which "paid or accrued" or "paid or incurred", dependent upon the method of accounting upon the basis of which the net income is computed, unless in order to clearly reflect the income the deductions or credits should be taken as of a different period. * * *

STATEMENT

In 1951 petitioner, The H. B. Ives Company, created a group life annuity plan for the purpose of providing retirement benefits for its employees who were under the age of 70 years. At a directors' meeting on November 24, 1953, the petitioner's president advised the board that four long-service employees were excluded from the plan merely because they happened to be over 70 at its inception. He stated further that "he felt we were really obligated to give these (ineligible) employees equivalent benefits, and he had contacted an insurance agent who had recommended the immediate purchase of annuities to take care of the company's obligation" (Pet. 12–13). The directors thereupon adopted the following resolution (*ibid.*):

> Resolved that the sum of $22,000.00 be appropriated and set aside immediately for the purchase of annuity contracts for the four (ineligible) employees, that the President be au-

> thorized to negotiate with various insurance companies and enter into the necessary annuity contracts to accomplish the purpose of the resolution, and that the moneys hereby appropriated and set up as a liability of the corporation as of this date and that negotiation with the insurance company be completed prior to February 15, 1954 when the first additional (ineligible) employee will retire.

Thereafter, petitioner's president negotiated with an insurance company which issued the annuity contracts on January 15, 1954 (Pet. 4). On the same date the insurance company sent petitioner an invoice for the contracts in the amount of $22,100.42, which was paid by petitioner on February 16, 1954 (Pet. 13–14).

Petitioner, which kept its books and made its income tax returns on an accrual method of accounting and on a calendar year basis (Pet. 12), made the following entry on its books as of December 31, 1953 (Pet. 14):

Dr. Pensions Paid	$22,463.89	
Cr. Accounts Payable		$22,463.89

It also deducted $22,463.89 as a business expense on its 1953 return.[2]

The Commissioner disallowed the deduction, determining that it should have been taken in 1954, and petitioner brought this action in the Tax Court to redetermine the deficiency which was assessed. The Tax Court held that the facts of the case could not be

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[2] It was admitted before the Tax Court that $363.47, the difference between the $22,463.89 deducted and the $22,100.42 actually paid, was an erroneous entry. (Pet. 14.)

distinguished from *Champion Spark Plug Co. v. Commissioner*, 30 T.C. 295, affirmed, 266 F. 2d 347 (C.A. 6), and that accordingly the accrual of the liability was properly deductible in 1953, "the time the obligation was incurred as it was in the Champion case" (Pet. 15).

The court of appeals reversed, holding that petitioner was under no obligation to pay the insurance company until the contracts were executed in 1954, and that before that time petitioner was subject to no underlying legal obligation to the four employees. Since the obligation to pay was not certain until 1954, the court below held the expenditure was not "paid or incurred" in 1953 within the meaning of Section 23(a)(1)(A) of the 1939 Code (Pet. 19–20).[*]

ARGUMENT

The decision below is correct; it is not in conflict with *Commissioner v. Champion Spark Plug Co.*, *supra*, or any decision of this Court or the courts of

[*] The Commissioner had contended alternatively that even if the obligation to purchase the annuities was found to have become fixed in 1953 so as to permit its accrual in that year, Section 23(p)(1)(D) of the 1939 Code precluded the deduction until the year of actual payment, 1954. That Section provides that compensation paid or accrued on account of any employee under a plan deferring the receipt of such compensation is deductible "in the taxable year when paid." The Tax Court rejected this contention on finding that "petitioner's purchase of the annuity contracts * * * did not represent compensation for past services and was not a method which had the effect of an annuity plan or similar plan deferring the receipt of compensation" (Pet. 14). Respondent made the same contention in the court of appeals which did not rule upon the point in view of its holding that the petitioner's obligation to purchase the annuities did not become fixed until 1954.

appeals, and no question is presented warranting review.

1. The deduction for ordinary and necessary business expenses allowed by Section 23(a)(1)(A) of the Internal Revenue Code of 1939 (*supra*, p. 2) is for such expenses "paid or incurred" during the taxable year. Section 43 (*supra*, p. 3) adds that deductions shall be taken for the taxable year in which paid or accrued or paid or incurred "dependent upon the method of accounting upon the basis of which the net income is computed." Under principles well established by decisions of this Court, in the case of an accrual basis taxpayer, a liability is to be reported no earlier than the year when all events occur which determine the liability to pay and fix the amount of the liability. A taxpayer may not accrue an expense, the liability for which is contingent. *United States* v. *Anderson*, 269 U.S. 422; *American National Co.* v. *United States*, 274 U.S. 99; *Niles Bement Pond Co.* v. *United States*, 281 U.S. 357; *Aluminum Castings Co.* v. *Routzahn*, 282 U.S. 92; *Dixie Pine Co.* v. *Commissioner*, 320 U.S. 516, 519; *Security Mills Co.* v. *Commissioner*, 321 U.S. 281, 284; *United States* v. *Olympic Radio & Television*, 349 U.S. 232; United *States* v. *Consolidated Edison Co.*, 366 U.S. 380, 385.

Applying these principles, the liability to make the payment for the annuity contracts did not become certain until 1954, when the contracts were executed. There was no pre-existing legal liability to the four employees and the resolution of November 24, 1953,

merely "appropriated and set aside" the sum of $22,000 "for the purchase of annuity contracts" for the four ineligible employees, and "authorized" the president "to negotiate with various insurance companies and enter into the necessary annuity contracts to accomplish the purpose of the resolution" (Pet. 13); it created no obligation. Nor did the entry by petitioner upon its books impose any obligation upon it; such an entry was plainly revocable at its will.

2. There is no merit to petitioner's assertion that the decision of the Second Circuit below conflicts with *Commissioner* v. *Champion Spark Plug Co.*, 266 F. 2d 347 (C.A. 6). There, the Sixth Circuit, affirming the Tax Court, held that the resolution imposed a definite and unconditional obligation on the corporation to pay a fixed amount in installments (commencing the following year) to a totally disabled employee. Based upon that holding, the court allowed the deduction of the entire obligation in the year the resolution was adopted. Here, the court of appeals determined that under the law of a different state a different corporate resolution did not impose a fixed obligation to the four employees concerned and accordingly denied the deduction.

The decisions are entirely consistent insofar as the application of Section 23(a)(1)(A) of the 1939 Code is concerned. And even a direct conflict—not present here—on the question whether the particular resolutions imposed fixed and definite obligations to the employees, would not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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